2010 WL 8606076 (Mass.App.Ct.) (Appellate Brief)
Appeals Court Of Massachusetts.

Francis J. GIORDANO, Plaintiff/Appelllant,

v.

Stephen F. GIORDANO, Giovanna Giordano and Heather Giordano, Defendants/Appellees.

No. 2012-P-0408.
March 10, 2010.

On Appeal from An Order of the Superior Court for Bristol County

Brief of the Plaintiff/Appellant

Thomas Arthur Hensley #231140, 18 Broadway, Suite 209, Taunton, Massachusetts 02780, (508) 822-0030.

***i** TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATUTES, RULES

NOTE RE: REFERENCES TO TRANSCRIPT:

With two trials, there are two transcripts, one in five volumes, the other in two volumes. References will identify trial, volume and page in the *two-volume* Transcript Record Appendix as follows:

2TTr, 100 = volume 2, transcript record appendix at 100 (as opposed to the original transcript volume and page)TAUBREFERENCES TO RECORD APPENDIX:

R= Record appendix

D= Docket (with paper number to follow)SY ***1 STATEMENT OF THE ISSUES**

I. The trial court (in trial part one) erred by instructing the jury, on the constructive trust issue, that the standard for deciding whether Defendant Giovanna (Gia) was a bona fide purchaser for value was whether she gave *any value*, and not a *reasonably equivalent* or *proportionate* value for the house, *Demoulas v. Demoulas,* **424 Mass. 501, 547-52 (1997); and further erred in declining to charge that substitution of one note for another (both secured by the trust) is not "value".** *Jones v. Swift,* **300 Mass. 177, 186-87 (1930).**

II. The trial court (in trial part two) erred in finding no actual intent to defraud creditors; in ruling that Plaintiff (Frank) failed to provide proof of value of the property at the time of the transfer from defendant Stephen to Gia; and in declining to take more evidence on that issue.

III. Both trial judges erred in declining to impose a constructive trust upon the property as a matter of equity, to avoid unjust enrichment of the Defendants.

IV. The Court (in trial part one), erred in precluding Frank from impeaching Gia by means of the falsified documents related to her 2006 loan. He erred, also, in precluding impeachment of Stephen by use of Taunton Building Department records that revealed a course of deceit by Stephen surrounding the erection of the garage.

V. The trial court erred in dismissing the elder abuse count.

SUMMARY OF ARGUMENT

I. "Any value" and Jones instructions. A jury instructtion on the question whether Gia was a bona fide purchaser (BFP), that *any value* would suffice, was erroneous. Gia paid nothing but an exchange of mortgages secured by the land. That is not "value". *Jones v.*

***2** *Swift,* **300 Mass. 177, 186-87 (1930).** What is required is a reasonably equivalent, or proportionate, independent consideration. *Id.; Demoulas v. Demoulas,* **424 Mass. 501 (1997).**

II. Fraudulent transfer: intent and reasonably equivalent value. Where Frank proved ten of eleven statutory "badges of fraud" in the context of his fraudulent transfer claim, a presumption (if not a conclusive presumption) of actual fraud arose. Stephen and Gia failed to rebut that presumption, if it was rebuttable at all. The court erred in failing to find the transfer to Gia to be fraudulent, and apparently overlooked all but two of the badges of fraud proven by *Frank. Hasbro v. Serafino,* **37 F.Supp.2d 94, 98 (D.Mass. 1999).** Where Frank provided a P&S agreement, an appraisal and admissions by both Stephen and Gia as to the value of the property, and the issue was not contested in a realistic sense, the court erred in failing to accept that value. *In re Palermini,* **113 B.R. 380, 383 (S.D. Ohio 1990);** *Panagakos v. Collins,* **80 Mass.App.Ct. 697 (2011). III. Equity and unjust enrichment.** Constructive trust is a judicially-created remedy for a circumstance in which a party has taken advantage of another who has relied on that party's judgment in business affairs, ***3** etc., to the detriment of the latter. As is demonstrated in arguments I and II, both judges erred in failing to find that Stephen and Gia violated Frank's trust to his detriment, and in failing to order a transfer back to Frank. *Barry v. Covich,* **332 Mass. 338 (1955). IV. Limitation in part one of impeachment of**

Stephen and Gia by use of documents. Gia's use of false statements and information to refinance is relevant where it happened while this action was pending; where it affects title; where it revealed a continuing course of conduct and a cavalier state of mind inconsistent with preservation of the equity; where at the refinance, lender, borrower and title insurer were represented by the same firm; and where the lender received no title report. The Court erred in preventing Frank from examining her about it. It was further error to prevent Frank from impeaching Stephen by means of relevant documents related to his application for a building permit. Those documents misled the Taunton Building Department, and were part of the fraud being perpetrated by him. Each of these rulings constituted an **abuse** of discretion.

V. The elder abuse count. The **Elder Abuse** Act, M.G.L. ch. 19A, secs. 14-26, creates a private right of action, ***4** and it was error for the court to hold that there is no such right. *Loffredo v. Centers for Addictive Behavior,* **426 Mass. 541 (1988).** This is apparently a question of first impression in the Commonwealth as to the Act.

STATEMENT OF THE CASE

This action was filed by Plaintiff Frank against his son Stephen (and wife, Heather, as a trustee process defendant), and his daughter Gia. The action sought to impose a constructive trust (and order a reconveyance) upon a home in Taunton that was deeded to Stephen in 2001(for the benefit of Frank), and was later deeded by Stephen to Gia in 2004, in what Frank calls a fraudulent transfer. Also claimed were a breach of contract by Stephen, **elder abuse** by both, and claims not involved on appeal. **R.19.** The case was bifurcated after Frank filed a Motion for a Speedy Trial. That motion was allowed on Feb. 1, 2007. D. 22 Rule 56 Motions were denied (Dec., 2007). **D. 76-82** The trust and contract issues were tried to a jury, Kane, J., in Dec., 2009, pursuant to Rule 39, Mass.R.Civ.P., (over Frank's objection as to the constructive trust count). The jury found in his favor on the contract claim against Stephen and awarded damages. They found Stephen did not take title by fraud, but that he violated a fiduciary ***5** duty in taking title from Frank. They found Gia was a BFP for value when she took title. **1TTr. 220-22.**

The fraudulent transfer claim was tried without a jury, McGuire, J., in June, 2010. He held that, when Stephen conveyed to Gia, he was insolvent, but did not commit an actual fraud by doing so. He also held Frank did not meet his burden of proof as to the value of the home at the time of the conveyance to Gia, and Frank had not proven that Gia gave less than a reasonably equivalent value for the transfer, within the meaning of ch. 109A. Early on, an **elder abuse** count was dismissed on motion of the defendants. **D. 43.** Judgment entered, and Frank's Motion to Amend Judgment to establish the constructive trust as to Stephen, was denied. **R.** Frank filed a timely notice of appeal, preserving all matters falling within the judgment. *Nolan, App. Proc.,* **41 M.P.S. at 87.** Stephen filed a notice of appeal as time for filing expired. His appeal was dismissed on Feb. 23, 2012. **D. 191.**

STATEMENT OF FACTS

A. Background. In October, 2001, Frank was owner of a grandfathered two-family home in a one-family zone. He purchased the home in 1976, paying back taxes and assuming an existing loan on the home. Widowed in 1974, ***6** Frank raised his four children (Mark, Gia, Stephen and Melissa, in order of ages) there. In 1981 he sustained a head injury in a work-related fall, and has been disabled since. He subsisted on workers compensation, part-time jobs, and SSI and SSDI. **1TTr 8-11.** In 1997, he refinanced with a $20,000 loan to pay his original mortgage balance (then under $3000), and to have money for repairs and some “walking-around” money. His mortgage payment then was $258 per month. **1TTr 13.**

In 1996 Stephen wished to buy into a cell phone business, and Frank loaned him $9100 from his workers compensation settlement. Stephen has not repaid that. **1TTr 17-18.** At first, after Stephen separated from a partner, the business seemed to do well, but as early as 1998, unknown to Frank, Stephen fell behind on taxes and other debts. **1TTr 48-55.** When the business opened, Frank spent time at the Buzzards Bay store to help out. Stephen testified that Frank took $150 for up to 54 hours per week (barely half minimum wage). Frank said he was not regularly paid, but took no more than $125/ week and most often just minor amounts for lunch, gas, etc. **1TTr 17, 29.** For a time, Melissa and a stepbrother (Michael) worked there, also. **1TTr 44-45.**

***7 B. Constructive trust. 1. Agreement.** By October, 2001, Stephen faced growing debt. In Frank's version, he approached Frank with a plan: he would take title to the house, pay off Frank's loan (thought to have a $15,000 balance, but actually $13,700), refinance and build a garage with an apartment on the lot. Stephen would sell it for a big profit, buy land in another town to build homes for Frank and Stephen, and have room for the sisters to build if they chose. Stephen projected building costs at $65,000, plus the expected $15,000 to pay the 1997 mortgage, requiring an $80,000 loan. **1TTr 21-22.** In an apparent attempt to help his case, Stephen disagreed with that estimate, but was unable to provide anything approaching a case for a higher cost estimate. **1TTr 56-58, 68-69.**

Frank agreed and the plan was given to the family (except Mark), at a meeting in Seasons Palace Restaurant in Raynham ("the meeting"). Neither Melissa nor Gia wanted in, and Frank wrote a deed to Stephen. Nothing else was in writing. **1TTr 22-23.**

Defendants deny this treatment of the meeting. Stephen has tried to promote the position that there was no deal, no "family compound" agreement, only an "understanding" that his purpose was to let Frank live ***8** rent-free for life. **1TTr 62-63.** When pressed on the issue, Stephen finally slipped and admitted an agreement:

Q: The deal was to take care of your father?

A: The deal was to take care of my father.

2TTr 61. He testified, when asked if he sought a way of doing this without taking equity from the house, that he prayed for a million dollars and bought a lot-tery ticket. **1TTr 82-84.** Meanwhile, Gia was aware that Stephen took title to care for Frank, *1TTr 124; 2TTr 115-16,* although she tried to avoid accepting any version. Either way, the touted purpose was to benefit Frank. Judge Kane found that a family compound was the agreement, **R. 149-50,** while Judge McGuire sided with the rent-free plan. **R. 157.**

2. Duplicity generally. Frank wished to show that when Stephen took title, he intended to build an apartment and knew he needed a variance for it, but deceitfully applied for a permit for only a garage with storage above, buildable as of right. A rough hand-drawn design given to the Building Department showed no plan for storage, while the contract with his builder had a ranch-style home with a deck and sliding door upstairs. This was offered to show that a florid pattern of de ***9** ceit was in full bloom, and that Stephen would do or say anything to get what he wanted from the project. See Stephen's Motion in Limine and Frank's opposition. **R.132, 137 et Ex. record.** Judge Kane excluded this as bad acts evidence. **1TTr 4.**

Stephen gave a mortgage to borrow $110,000 for the $80,000 project. The excess he used for personal bills, (although he tried to say, in a nonsensical way, that the excess went into the house), **1TTr 59-61,** and for the purchase of a bigger fishing boat, which he titled to Heather, saying that she bought it. He sold his old boat to pay the $13,700, but recouped the money on taking the loan. He did not tell Frank the amount borrowed, but both claimed and denied he did, or that Frank knew, or some other version of facts. **1T2, 123, 151-52.**

The garage was erected quickly but the top floor sat empty and incomplete for three years. In 2002, Stephen needed more money, so he refinanced for $160,000 and kept the extra $50,000. **1T2, 152-53, 155-56.** Frank was not told of this, either:

Q.: Why didn't you tell him?

A.: I just didn't, it was my - it was my business. I'm paying everything - ...

***10** Stephen's vapid, confused attempts to conceal what happened to that money, **1T2, 152-54,** were typical of his testimony throughout. Compare, e.g., **1T2 166-71,** where he tried to deny knowing that he was behind on taxes from 1998 forward, and was obviously evasive about it in response to a request for admissions.

C. Fraudulent transfer. By April, 2004, Stephen's business was closed. He was unemployed; deeply in debt (more than $100,000 to IRS and DOR, plus an execution held by American Express, "AmEx", **R.41-47**); and behind on the house payment. **2T1, 107-15.** He had little property other than an SUV worth "$3, 4, 5000", and $55,000 from sale of a Dodge Viper (which money he used to save the house from foreclosure, and for bills - although he first said he used it "for my wife's -", but caught himself and said it was for his bills). **2TTr 57, 62.** He sold a bass boat titled to him, and three days later bought another, this one titled to Heather, but Gia believed it was Stephen's. **2TTr 104-05.** He tried to deny that this fraudulent transfer had anything to do with his debt. **2TTr 34-43.** Another car (a Mercedes) was sold. That vehicle was titled to others, but when he sold it, Stephen kept the money. **2TTr 33-34.**

***11** Stephen contacted Gia, an insider, and asked her to take the house. She agreed. Both deny in part two discussing his financial situation, except that Stephen told Gia he could not afford the house. Stephen said he did not tell Gia about his problems, **2TTr 55-56,** after admitting in part one that he "explained to [Gia] that [his] business was in trouble." **1TTr 76-77.** Gia denied being told this. [Note that a transcript of part one was not available before the trial of part two.] In part two, he stated that he called Gia and told her he could not afford the house and needed some help-thus he asked her to buy the house. **2TTr 26a,b.** He said he paid rent to Gia after the sale, and had the Viper money, but insisted that he did not pay all the rent-some being paid by Heather, and some, he claimed, by Gia. **2TTr 27.** In part two, despite persistent attempts to deny it, Gia admitted to having information about Stephen's money issues and the threat of his losing the house. Gia said Frank told her the business was closed or closing, that Stephen would be out of work. **2TTr 92-97.** She admitted in part one she knew "[Stephen] had a lot of troubles with the business." **1TTr 124-27.** She said he "asked her for a favor" and she bought the house, **2TTr 95; 96, 1.23 to 19, 1.5.**

***12** Stephen stated that, when he asked Gia to buy the house, the mortgage was behind, but he also said he redeemed it last minute from the Viper money. Despite the fact that the Viper money could have carried the approximately $1575/month mortgage, taxes, etc., payments for thirty months, giving him plenty time to find work, he did not cancel the coming transfer to Gia. **2TTr 62.** The money was obviously used for his purposes.

To repeat: Gia denied knowing the details of Stephen's debt, **2TTr 68-70,** but clearly knew enough to put a reasonable person, and particularly a business woman, on inquiry, and to raise a concern that he was unable to pay for the house. **1TTr 124-25; 2TTr 92-98, esp. 94, 11.7-20; and 127-28.** In fact, he was insolvent. After the transfer, Stephen maintained control of the property. He lived there with Heather until late 2005, when they moved to a home she bought in Berkley. Before that he finished the apartment (with money gotten from Frank and not from Gia, the purported owner).

He continued to store his boat (i.e., despite the fact that it was titled to his wife, he slipped during trial and called it "my boat" four times, **2TTr 13-18**) in the garage after he was gone, even to the time of the second trial in June, 2010, **2TTr 18, 1.20.** His own ***13** ership of the boat was so obvious that Gia referred to it as his boat. **2TTr 106-07.** He kept his tools and equipment in the garage after he moved out, **2TTr 14-15,** even when Gia claimed to have a tenant for the apartment who demanded exclusive use of the garage. Gia did this knowing that there was no variance or occupancy permit for the illegal apartment, and no permits for it or the septic. **2TTr 74-78.** Stephen referred to the canteen truck titled to Heather as "my canteen truck" during the trial, apparently having forgotten the fraudulent transfer to Heather of the truck, **2TTr 10-12,** thus further establishing the fact that he sold or concealed title to everything he owned just as his creditors were nearing enforcement.

Stephen helped with removal of Frank's and Melissa's property from the garage without court process. **Id.** He negotiated Melissa's tenancy. **2TTr 4-5.** When Frank claimed the garage, well after the transfer to Gia, Stephen said, "It's my garage. I built it." **2TTr 154-55.** Stephen found new tenants; **2TTr 18;** collected rent (he preferred cash) **2TTr 155-57;** helped install a front walk; brought (but did not spread) loam, **2TTr 150-52;** arranged hydroseed after the tenants had already seeded it, id.; plowed the snow **2TTr 129, 138;** and he person ***14** ally changed the locks on the garage and apartment. **2TTr 18.** He dealt with the aftermath of a flood after the deluge of March 31, 2010. **2TTr 21-24.**

Most telling on the subject of control is the fact that Gia gave a second mortgage for a line of credit, used it to extract $33,000 (including closing costs) from equity, and gave that to Stephen to buy his canteen truck. (Note, however, her circumlocution

on the subject of use of the $33,000, **2TTr 70a, b; 72-73**). She gave Stephen $200/month from rent, and tried to explain that she did this so Stephen could use it to pay the line of credit, i.e., she allowed the house to pay it. **2TTr 140-46.** Long after he left, he continued to get important mail (IRS, DOR) at Frank's home and, absurdly testified that his food license from Brockton for his canteen truck and DOR correspondence are sent in duplicate to his Berkley residence and to Frank's. **2TTr 19-20.** He tried to sell the house to Melissa and her husband, after the transfer to Gia. **2TTr 47-49.** [Note that a legal brush fire arose over the Defendants' intention to bring out the fact that Melissa's husband is trial (and appellate) counsel for Frank, resulting in a motion in limine by Frank to exclude evidence of that relationship, and a protracted, unseemly aside as the ***15** issue was addressed out of the presence of the jury. **1TTr 86-119.**] Clearly, Gia was no more than an absentee straw owner; Stephen kept control in nearly every way except holding title.

Frank maintains that Gia did not give a reasonably equivalent value for the property, where her consideration for the transfer was the substitution of her mortgage loan ($165,000) for Stephen's $158,000 balance. No money was given to Frank or Stephen (**2TTr 3**) and Gia made no down payment. She said in part one that at the passing, she left a check (barely $1,000), but did not know why. *1TTr 126.* Closing costs were rolled into the loan. *Id.* The transfer was based on a purchase and sale agreement with a $300,000 sale price, a forged gift of equity letter, and an appraisal for $321,000. *Id.*

Gia agreed that the appraisal was based on "as is [condition] and not valued subject to all repairs, alterations, etc., that the condition of the house might require..." This flew in the face of her claim that the property was worth less because it needed $80,000 worth of repairs. **2TTr 82-83, 98-105.** Beyond that, Gia did not realistically dispute the appraisal, **1TTr 125-26, 2TTr, 68-70a,** except to say she would not have paid that much for it, *id.*, and that Frank's residence there ***16** reduced the value. A spurious objection to the appraisal document was denied, also. **2TTr 50-52.**

Frank said the transfer was concealed from him, although Gia said otherwise, but she admitted not telling him the amounts borrowed in any of her loans. **2TTr 85.** Shortly after the sale, the liens from IRS and DOR and an execution from AmEx (more than $125,000 in toto), began to be recorded against Stephen. **2TTr 38-40.**

During the second trial, Gia argued that, because she allowed Frank to live in the house without paying rent, this reduced the value of the house. Her argument was unaccompanied by citation, and did not address the fact that ch. 109A, sec. 4(a) specifically holds that a promise to care for the transferor or another is not value. She said that there was no agreement for this to happen, only an "understanding". She refused to say it would extend for Frank's lifetime, **2TTr 118-26,** clearly trying to avoid the constructive trust issue, while at the same time demolishing her reduced value argument.

Late in 2004, after the transfer, Stephen (and not Gia) began to finish the apartment with help from family. As he did so, he borrowed $8200 from Frank (and not Gia, but see her vague, inspecific and uncorroborated claim to have bought things, **2TTr 65-67**), for ***17** completion of the work. All Gia could specify that she bought for the finish was faucets for a sink. *Id.*

Stephen admitted that he had $45,000 left over from the sale of the Viper just months before he finished the project, but still borrowed from Frank, while he used the Viper money for personal bills (credit cards, etc.), **2TTr 57-62,** and then tried to say he used that money for the house, the apartment, and rent payments to Gia, and that it was all gone in six months. That represents $6000 to $7500 per month to carry a small apartment, and it defies belief. What glows from this passage is that Stephen used none of that money for his creditors and that Gia, the alleged owner, did not pay for the project. **2TTr 57-64.** Again, Gia did little a true owner would do, **2TTr 85-92,** cementing the perception that she was merely a straw owner.

In February, 2005, Stephen borrowed $10,000 from Melissa's husband to buy a canteen truck business. Soon after, Gia gave a second mortgage for a loan of $33,000, making a total of $198,000 in debt secured by the house. That loan was used to pay Melissa $9000 and to pay for the new business. The truck used in the business was titled to Heather, but she knew no details of the purchase. Stephen found the truck and paid for it. That ***18** truck was traded for another truck, and Heather knew none of the details. The trucks were used exclusively for Stephen's business, and Heather had no ownership interest in the business.

Stephen paid no rent for their use. **1TTr, 66-71; 2TTr 158-64.** In opposition to a motion to prevent sale of the truck, he said he needed control to make business decisions. **R.78.** The titling of the truck to Heather represents an obvious fraudulent transfer.

Over the course of 2005, old tensions in the family worsened. Despite knowing the apartment was illegal, with no variance or occupancy permit, Gia rented the garage and apartment to someone outside the family and, on a pretext that the renter demanded exclusive use of the garage, used self-help (including help from Stephen and Heather) to remove Frank's and Melissa's property from the garage, **2TTr 74-78,** *but Stephen continued to store his boat and other property there for the winter and long after that.* He has said he still intends to correct the permit issues and that he will never be off the hook, but tried to wiggle out of those admissions. **2TTr 24-26.**

D. Impeachment. Stephen has said that Frank could not afford the house when he gave title, but his mort ***19** gage was current, the payment was modest, and there was a rental unit to help if Frank needed it. Stephen said this was to give Frank a place to live for life, while denying any agreement that he made or that was known to Gia. Both rely on the fact that, earlier in 2001, Frank filed bankruptcy, and credit card debt was discharged, after which Frank had no debt other than a small mortgage payment. **1TTr 24-26.** They omit that Frank financed Stephen's business with the $9100 loan in 1996, and Frank, not Gia, gave him $8200 to finish the apartment in 2004. Frank (and the equity) financed what Stephen has done since 1996, and though he was not wealthy, he lived without the help of Stephen. **1TTr 33-40.**

Stephen's depiction of Frank's financial state was shown to be a fabrication. Bank records proved that the 1997 loan was never late, despite Stephen's testimony that Frank was always complaining about it being late. Faced with the bank record, he said, “My father must have been lying to me, then.” **1TTr 39-40; 2TTr 53-54.** Pressed about Frank saying the payment on the 1997 loan was late, Stephen said:

I don't know. That I can't answer. I'm not sure. I know he did say things like that before maybe. I'm not sure. I can't answer that.

***20** **1TTr 39-40.** He also said that Frank was $400 short each month, but admitted Frank could have taken that much or more from the till at work, and that Frank did not need to give up the house to cover his expenses. **1TTr 29, 41-46.** He did not deny that Frank sometimes took nothing for his time at work. **1TTr 44.**

It was clear that there was a promised benefit to Frank from the transaction, even by Stephen's nonsenseical telling of it, with no proof that Frank agreed to any more than $80,000 for the garage/apartment. That Gia knew of and accepted that agreement is found in her testimony, first, that she was at the meeting; second, that she knew when Frank transferred to Stephen that he was taking the property to take care of Frank, **2TTr 116,** and third, that Frank has lived there rent-free despite her hollow denial of such an obligation. **2TTr 119-26.**

Stephen also testified in part two, entirely without documents, records or even an intelligible explanation, **2TTr 5-8,** that he personally spent as much as $170,000 to support the house from 2001 (when he took title), to 2004 (when he conveyed to Gia in April). With a smallish house, unspecified expenses and a monthly mortgage payment of only $1,575 including taxes, **2TTr 62,** it is ***21** clear that Stephen simply fabricated this, as he did most of his other testimony.

E. More duplicity. After suit was filed, Gia's counsel called Frank's with a request to vacate a lis pendens that was allowed at the filing of suit, to let her refinance at a lower, *fixed* interest rate, and then the lis pendens could be reinstated. It appeared that minimization of the interest rate would be beneficial, but it also seemed impossible to refinance on that title (action pending to take away title, IRS, DOR and AmEx liens on record). The suit was very new; presumptions of good faith were indulged, and Frank agreed. To his utter surprise, Gia refinanced, with what was called a *“fixed/variable”* interest rate (not a fixed rate).

The loan was $205,000 (the payoff on Gia's two loans plus closing costs). Her loan application said she was not a party to a lawsuit, and showed no property of her own other than the house. She gave an affidavit for the title insurer in which she swore that there was not and had never been a dispute as to title, or any known zoning issue (this seven days after depositions

attended by Gia, one of them her own, where the variance and Title V issues were covered). **R.82-108; 123-27.** See 18 U.S.C. 1014 (fraud in credit application). The affi ***22** davit was notarized by the conveyancer. Both the conveyancer and Gia's trial counsel were members of the same firm, and no title report was given to the lender or the insurer. A firm member issued a title insurance policy with no exceptions. Frank was not permitted to use this information to question Gia at the first trial part, but was during the second. **1TTr 5, 2T2 45-56.**

ARGUMENT

I. The trial court (part one) erred in instructing the jury that, in considering the trust issue, the standard for deciding whether Gia was a bona fide purchaser (BFP) for value is any value, and not a reasonably equivalent, or proportionate value standard found in Demoulas v. Demoulas, 424 Mass. 501 (1997); he erred in failing to instruct the jury that a trade of one note for another (both secured by the trust) does not constitute "value", Jones v. Swift, 300 Mass. 177 (1938); and failed to instruct properly on notice.

"A judge's function is to structure the final jury instructions based upon the evidence of the case."

DosSantos v. Coleta, 81 Mass.App.Ct. 1,6 (2011). On the question whether Gia took title as a BFP, Judge Kane charged, in reliance on a section of the Restatement of Restitution, that any value would suffice. **1TTr 173-74, 186-90.** The charge was given over counsel's objection and argument that the standard is "reasonably equivalent value", citing *Demoulas and Jones, supra. Id.* Counsel also argued, and requested a charge, that the substitution of one note for another, both secured by the ***23** trust, was not value. *Jones, supra at 186-187.* Those cases are similar in meaning to this case. Motions in limine addressed to each issue were decided adversely to Frank. **R.108-121 ,** and were addressed in the charge conference, **1TTr 141-49.**

In *Demoulas,* **at 547-552,** the court impressed a constructive trust upon a pilfered corporate opportunity and forced a conveyance of stock from a defendant, despite her investment of $50,000 in a lucrative project. The court held that there must be an investment proportionate to the value of the opportunity. The amount of the investment would affect restitution at the end, but would not prevent disgorgement. Moreover, the disparity in the amount invested and the worth of the project provided notice that there was a breach of trust. *Id.*

While that case involved a corporate opportunity, it is in kind like what has happened here. The equity in the house is analogous to the corporate opportunity. The house was stripped of half its equity for the benefit of Stephen. Both he and Gia are unjustly enriched (he having taken half of the equity, she now claiming the rest, and not a dime having gone to Frank). This is archetypal unjust enrichment: pay nothing, get a whole house.

***24** Frank requested a charge based on *Demoulas and Jones, see supra,* where Gia took title by paying nothing, just replacing one mortgage with another, and did so without even paying closing costs: the equity in the house paid them. The basis for the *Jones* result is clearly the inequity of a transfer without an independent consideration, **300 Mass. at 186-87,** where the note is secured by the trust, and the buyer's punishment for default would be the trust paying the damages, with no personal loss. Here, if Gia were to default, the lender could foreclose and the house would pay the loan, with any surplus to Gia. Frank has made "a 'plausible showing that the trier of fact might have reached a different result"' after a *Jones/Demoulas* instruction. *Grant v. Lewis/Boyle, Inc.,* **408 Mass. 269, 275 (1990).** Such an instruction *mise-en-scene* would surely have brought a different result. The injustice is underlinedby the fact that, when Gia took title, rents were paying the loan. She was no BFP. Only Frank, who had paid for the house for 25 years, could lose here.

With respect to the BFP instruction's reliance on the Restatement, it is suggested that our courts selectively adopt them. *See Bongaards v. Mullen,* **440 Mass. 10 (2003),** which recites a sprightly judicial debate ***25** about the matter of adoption of a section from the Restatement: Property. In varying contexts, our appellate courts have been picky, e.g.:

> ...[W]hile this court often considers the various Restatements of the Law as prestigious sources of potentially persuasive authority, we have never taken the position that this court should abdicate to the views of the American Law Institute as set forth in its various Restatements.

Lou v. Otis Elevator Co., **77 Mass.App.Ct. 571, 580-581 (2010).** *See also, Judge v. Carrai,* **77 Mass.App.Ct. 803, 809-811 (2010)(Berry, J., dissenting).** This case sounds in equity, and a Restatement does not limit the powers of this court to find a just result. The matter of value is left to local law, which holds one cannot take the property of another for nothing: "A person who has been unjustly enriched at the expense of another is required to make restitution ..." *Salamon v. Terra,* **394 Mass. 857, 859 (1985).** There, the Court chose to cite this rule, but not others from the Restatement, such as the term "value", as *Demoulas and Jones* determined.

The "any value" instruction was erroneous and critical, and the judgment must be reversed as to Gia, despite her ululations that her mortgage was "value".

The instruction regarding the notice issue, as it pertains to the question whether Gia was a BFP, was in- ***26** sufficient, where it failed to relate it to the facts brought forth in the trial. Clearly, if Gia gave value but had notice of the trust, she is held to be a trustee. *Ratshesky v. Piscopo,* **231 Mass. 180 (1921).** There is proof of notice to her of the arrangement's purpose in her admitted presence at the meeting, and her knowledge of an "understanding" related to Stephen's purpose either to create the family compound or to allow Frank to live rent-free for life. This reveals that she knew (and admitted) they were talking about how to care for Frank. She did not testify that Frank gifted the house to Stephen, nor did she deny that a plan was discussed. She gave no alternative other than bare denial of knowledge that was clearly contrary to the only logical conclusion.

There is further proof of Gia's knowledge found in the fact that she accepted title in the first place. Were there no tag on the transfer from Frank to Stephen the cure for Stephen's alleged inability to make the mortgage payment (despite having gotten $55,000 from the sale of the Viper), would have been to sell the house, and not to convey to Gia. With a loan balance of $1158,000 and a value of $300,000 (the P&S price) or of $321,000 (the appraised value), a sale could have ***27** left a net amount of $142,000 to $163,000. Logically, were it not Stephen's intent (and his obvious obligation) to help Frank, he could have kept that money. If he promised to see that Frank could live rent-free, he could have used that money to put Frank into **elderly** housing at a low cost for life, even after having taken $80,000 over his construction costs. Add in Gia's borrowing the additional $33,000, and it is clear that as much as $170,000 unrelated to construction was taken from Frank. At the probably overestimated rate of $900 per month, this would have allowed Frank to live in an alternative spot for fifteen years, or until age 85, before he would have needed to worry about his housing. Reality confirms Frank's family compound story, but even if the rent-free version is accepted, the project was appropriately for the benefit of Frank. The acts of both Stephen and Gia were in violation of a trust about which both knew, and which both **abused**.

The trial court erred in failing to personalize the BFP instruction, *DosSantos, supra, id.,* and in failing to set aside the BFP finding, as a matter of equity, where it was clear that Gia had notice, and that she gave insufficient value for the transfer to her. See Argument III.

***28 II. The trial court (in part two) erred in finding no actual intent to defraud and in ruling that Plaintiff failed to provide proof of value of the property at the time of the transfer from Stephen to Gia.**

After a jury-waived trial, the standard of review is as stated in *Panagakos v. Collins,* **80 Mass.App.Ct. 697, 701-02 (2011) :**

> The findings of fact of the judge are accepted unless they are clearly erroneous.... [The Court reviews] the judge's legal conclusions de novo...

The Court held that a finding is clearly erroneous when,

> "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed..."

A reviewing Court will "scrutinize without deference the legal standard the judge applied to the facts..." The 'clearly erroneous' standard of appellate review does not protect findings of fact or conclusions based on incorrect legal conclusions. *Id.* Applying this rule, the judgment on the fraudulent transfer issue must be reversed, for the following reasons.

Chapter 109A describes two types of conduct that make a transfer voidable. **Section 5(a)(1)** goes to actual intent to defraud, and **secs. 5(a)(2)(ii) and 6** deal with constructive fraud (regardless of intent). The range of admissible evidence in a fraudulent transfer ***29** case is very broad. **5 POF, "Fraudulent Conveyance" 697, 703.** Frank has proven both types.

a. Actual fraud. A transfer is "fraudulent as to a creditor" if it is made "with actual intent to hinder, delay or defraud **any** creditor of the debtor." **5(a) (1).** Section 5(b) recites eleven suggested inquiries to determine whether there is actual fraud involved. These are generally called "badges of fraud". **Palmer v. Murphy, 42 Mass.App.Ct. 334, 345 (1997).** Even if a transfer might serve the purpose of avoiding foreclosure, it is still fraudulent as to all other creditors (IRS, DOR, AmEx, etc., and Frank). **In re: Gabor, supra, at 154, 159.** The court found (without citation) that Stephen conveyed to Gia to prevent foreclosure, "preserving the home" for Frank, and not to defraud. This is error.

The court's findings, at 6, acknowledge that "some" badges of fraud listed in the Act are present, and then names only two: Gia was an insider, **5(b)(1)** (failing to note that this badge creates a heavier, affirmative burden on Gia to show reasonably equivalent value, *In re Pilavis,* **233 B.R. 1 (D.Mass. 1999));** and Stephen was insolvent. **5(b)(9).** No attention is paid to the other badges Frank proved. In fact, Frank showed more than ***30** twice the number of badges as in *Gabor, supra* **at 158.** Stephen concealed the transfer from Frank and sold or concealed other property (*e.g.,* Stephen sold his Viper and a Mercedes he owned and used the money for his own purposes, not for the benefit of Frank or other creditors), and he titled his boat, truck and home to Heather, **5(b)(3, 7, 11).** Stephen kept control of the house, living there, collecting rent, storing his property there long after he moved, etc., even getting $30,000 from equity for his new business and $200 a month from rents after the transfer, **5(b)(2);** *Heimbinder v. Berkowitz,* **670 N.Y.S. 2d 301 (1998).** He was unable to pay bills, **3(a), (b);** he owed more than he owned or earned, **5(b)(5).** Hasbro, supra, at 98. Suits, liens and levies were near, **5(b) (4, 10),** *Rodriguez v. Montalvo,* **371 F.Supp.2d 3 (D. Mass. 2005).** Stephen got nothing in the "sale", **5(b)(8).** This creates a conclusive presumption of fraud. *Hasbro, supra,* **at 98;** *Fleming Cos., Inc. v. Rich,* **928 F.Supp. 1281 (E.D.Mo. 1978).** In total, ten badges of fraud were proven during the trial, the only one not proven being that Stephen did not abscond. **5(b)(6).**

Judge McGuire's findings overlook the fact that Gia joined in the plunder of the equity when she borrowed $33,000 for Stephen's benefit after she got title, and ***31** for a period gave him $200 per month from the rents, making her a joint actor. She was directly involved in Stephen's continued control of the property. The findings omit that Gia, despite her ludicrously false denial that she did so, ordered Frank to stay out of the garage in which Stephen stored his goods - more control on *his* part. **2TTr 108-114.** This is the badge of one assisting in a fraud.

It bears mentioning a third time that the findings omit that, after title was passed to Gia, she admitted giving money from the rents to Stephen. **2TTr 140-46, esp. 143.** That slipped admission showed that she gave Stephen money from the house and then used the income from the house to repay it, in effect a double-dip. Stephen's siphoning the equity dry is control, even if Gia held the hose. He was likely to lose the house to creditors, not just the bank, and he meant to avoid that problem. The "prevent foreclosure" ruse is given the lie by her conduct in keeping control from Frank and ceding it to Stephen and by the fact that the mortgage was actually current when she took title, at a time when Stephen had the Viper money that would have paid the mortgage for two-and-a-half years. **2TTr 56, 62-64.** The move was a shared fraud on creditors.

***32** The findings overlook another principle. An insolvent debtor gets less than reasonably equivalent value where he transfers his property for consideration which passes to a third party (here, Stephen's mortgage bank). *In re: E.N.T. Surgeons of Worcester,* **49 B.R. 316, 319 (D.Mass. 1985).** Nothing in *Shamrock, Inc. v. F.D.I.C.,* **36 Mass.App.Ct. 162,170 (1994),** militates against this position, because that case involved full consideration, with no diminution in debtor's estate. The pay-off of Stephen's mortgage, in an amount of about half of actual value of the house and nothing going to him or Frank, is redolent of fraud. *Hasbro, supra* **at 98.** It is suggested that, to deny a finding of actual fraud in this transaction, the court applied a stilted construction of **sec. 5(a)(1).** The statute is abecedarian and it mandates a finding of fraud.

b. Constructive fraud. A conveyance for less than a reasonably equivalent value is voidable if the debtor is insolvent at the time, or becomes insolvent by the transfer. **Secs. 5(a)(2)(ii) and 6.** Lack of a reasonably equivalent value also makes a transfer voidable if the debtor believed or reasonably should have believed he would incur debts beyond his ability to pay as they became due. **Sec. 5(a)(2)(ii).** Frank showed Gia gave no ***33** value for the transfer from Stephen, where she gave no independent consideration. The transfer was based upon a P&S agreement with a price of $300,000, and the sum "paid" was the payoff of Stephen's loan by a loan to Gia for $165,000 (with closing costs). The appraisal from the closing package for Gia's loan gave a value of $321,000 to $331,500. In her testimony, Gia accepted that value, except to say she would not have paid that much for the house. She proved no other value. *See Pilavis, ubi supra* (heavier burden to show a reasonably equivalent value is on Gia, an insider). It is error to fail to acknowledge this principle.

Viewed differently, the disparity between her purchase price and actual value is so great that $165,000 cannot be viewed as a reasonably equivalent value, even without applying the *Jones* principle. *Compare, e.g., In re Gabor, supra* (sale to children for $45,000; house valued by court at $85,000; not a reasonably equivalent value).

Despite all this, the court found that Frank did not meet his burden of proof by not bringing the appraiser to test her opinion. The judge did not say that he disbelieved this evidence, *compare Comm. v. Adkinson,* **80 Mass. App.Ct.570, 587-588 (2011),** rather that, despite ***34** clear evidence of an appraisal value, the value in the P&S agreement and Gia's (and Stephen's) lack of refutation of that value, the burden of proof was not met. Note that cases like *Turners Falls, Ltd. V. Board of Assessors of Montague,* **54 Mass.App.Ct. 732, 136-38 (2002),** do not affect the outcome here, since those cases relate to the question whether an appraiser is an agent of a party, and thus hold that he is not, and his opinion is not an evidentiary or judicial admission. In this case, the appraisal was admitted and not rebutted; and there was no alternative appraisal presented by the Defendants. Thus, there is no basis to ignore the appraisal amount. This is error.

Once a Plaintiff presents competent facts, a Defendant must produce evidence to the contrary if the facts are germane to the issue being tried, *In re Palermini, supra, at 383* (burden to produce *persuasive* evidence as to solvency), as opposed to the court's reasoning in rejecting value evidence here. Gia did not realistically defend on the basis that the appraisal that she used to get her loan (binding evidence when considered with her testimonial admission as to value) was not valid, except to say she wouldn't have paid that much. *See, Panagakos, supra* (error in holding Plaintiff did not ***35** meet his burden of proof on issue not defended); *Comm. v. Adkinson, supra at 581* (ruling based on issues not raised is error) **and 587-588** (Judge did not say he disbelieved expert opinion, yet rejected it).

Gia's exasperating argument that replacement of Stephen's loan with no consideration going to him or Frank was equivalent value is more cry than wool and comes with no cited authority (other than an oblique reference to *Jones*), and thus the argument carries no weight. Moreover, the holding on the issue failed to apply correctly the law found in the court's cited case, *First Fed. Savs. & Loan Ass'n of Galion, Ohio v. Napoleon,* **428 Mass. 371 (1998).** In the findings, at p. 7, the court held "[the] burden of establishing inadequate consideration is on plaintiff, while [the] burden of proving insolvency can shift". *Napoleon* involved, however, a stipulation as to inadequacy of consideration, *id.* **at 372,** and the issue was not tried. A close reading of the case does not reveal wording inconsistent with the thought that, once Frank put in a prima facie case as to value, the burden would shift to the defense -- the usual rule in civil trials, *id.* **at 381.** In fact, *Pilavis, supra,* puts the burden as to value on Gia. The P&S agreement, the appraisal and the Defendants' testi ***36** mony accepting that value are judicial admissions, and are conclusive and not rebutted; they set out a compelling case.

Napoleon cites **Palermini, supra,** which, at **384-85,** provides support for Frank's position. It involved an issue whether a transfer from husband to wife, contemplating divorce, could be supported by promises to care for an invalid brother of transferor, and to pay the mortgage loan, two factors involved here. The court held that this was (even with a transfer anticipating future alimony), not enough to prove a reasonably equivalent value. While Gia did not assume Stephen's mortgage, there is no difference in kind where she replaced his mortgage with her own, with no personal contribution. The new loan is not "value", and proof of actual fraud is unnecessary.

The findings stress, at p. 7, that "the house at that time was in disrepair. The construction of the garage and ap ***37** artment over it was incomplete". This seems to indicate he believed Gia's phantasmagorical statement that the house needed $80,000 in repairs, *with little description of what was needed,* **2TTr 70,** and it omits that the biggest issues, the bathrooms, were replaced for a mere $5,000; that Stephen finished the apartment with $8200 borrowed from Frank; and that the home was appraised "as is and not valued subject to all repairs, alterations, etc., that the condition of the house might require"; and value was not really disputed. The findings ignore the need for independent consideration and ignore that, even subtracting a spurious claim of $80,000 for repairs from appraised value, Gia still would have taken title for only three-fourths of the real value. *United States v. McCombs,* **928 F.Supp. 261, 271-72 (1992)** (67% not adequate consideration; Federal and New York law).

The trial court's decision relied in part on the jury finding that Stephen did not defraud Frank when he "persuaded Francis to convey the home to [him]", avoiding the jury's finding that Stephen violated a fiduciary duty in taking title from Frank. That finding was used to buttress a conclusion that "Stephen had no intent to defraud Francis when he further conveyed the home to his sister..." The court ignored Stephen's mendacity on the witness stand; his fraud upon the Building Department; the Title V illegality; his six-figure dips into equity (with Gia's help); and he also failed to account for all the badges of fraud and their eff ***38** ects on other creditors (an issue as important as fraud upon Frank).

It was unrebutted, in any real sense, that Stephen's conduct was a fraud from beginning to end. The finding that he did not take by fraud was plainly wrong, and was against the clear weight of the evidence. **See Rule 59(a), Mass.R. Civ.Proc. Compare J. Edmond & Co. v. Rosen, 412 Mass. 572, 576 (1992),** where the Court held that the trial judge did not **abuse** her discretion in denying a Rule 59 motion, because the parties presented competing versions of facts and expert testimony. In this case, there were no conflicting versions of the means of Stephen's plunder, only his fully impeached denials. The facts underlying his fraud were unrebutted and conclusive, and thus the verdict on that Count was against the clear weight of the evidence. Therefore, that verdict provides no support for the proposition that Stephen did not defraud his father, as stated by Judge McGuire.

After Judge McGuire issued his decision, Frank moved for a new trial, judgment notwithstanding the verdict, and to reopen to provide further evidence on the value issue, pursuant to Rule 59(a). That motion was denied without opinion or rationale, except to note that a ***39** promise to care for another is not value, **sec. 4(a).** This denial was an **abuse** of discretion (*see Smith & Zobel,* ***"Rules Practice",*** **7 M.P.S. sec. 59.9**). A case that is helpful is *Halper v. Browning, King & Co.,* **325 F.2d 644 (D.C.Cir. 1963),** where confusion as to burden of proof made denial of such a motion an **abuse** of discretion. Here there seems to be judicial confusion as to both the requisite quantum of proof of value and the burden of proof, and denial of a motion to re-open for additional evidence was error, as the defense was not built on actual value of the property. *Panagakos and Pilavis, supra.*

The finding after trial and the disposition of the rule 59 motion, perhaps most particularly the refusal to re-open the evidence, were against the clear weight of the law. *Contrast, Kaltsas v. Duralite Co., Inc.,* **4 Mass.App. Ct. 634, 639 (1976)**(moving party introduced no contradictory evidence). While there is not a separate argument herein pertaining to the Rule 59 questions, it is suggested that the questions are alive on appeal, where it is shown that the basic judgment is erroneous and where, particularly in a jury-waived context, this court has the same equitable powers as the trial court.

***40** The evidence as to value was clear here. Though counsel may pose and prance around the issue, Gia and Stephen both admitted that the value of the property was $321,000. The judgment was entered in error.

III. Both trial judges erred in failing to order judgment for Plaintiff as a matter of equity, based upon the clear evidence of unjust enrichment of both Stephen and Gia.

A constructive trust may be said to be a device employed in equity, in the absence of any intention of the parties to create a trust... to avoid the unjust enrichment of one party at the expense of the other where the legal title to the property was obtained by fraud or in violation of a fiduciary relation...

Barry v. Covich, supra, ***cited in Dunphy, Probate Law & Practice,*** **22 M.P.S. sec. 37.14 at 37 (West 1997),** where it is written:

> The constructive trust is a remedial device, as distinguished from substantive, fostered by equity by which the holder of the legal title is held to be a trustee for the benefit of another who in good conscience and as a matter of equity is entitled to the beneficial interest.

The jury found that Stephen violated a fiduciary duty in taking title to the house. He was a trustee, with a duty of fidelity, requiring that he be "actuated by an honest, intelligent and diligent effort" to preserve the property and its equity *for Frank's benefit. Berry v. kyes, supra,* **at 58-59.** The evidence shows he took money and built a garage for his own purposes. If he ***41** really meant to pursue the family compound or ensure Frank could live rent-free for life, he failed to do so when he stripped the equity in the home such that the house will not now support either plan, and then quit. Note, also, Giovanna's judicial admission, R. 120, that, at the least, she owes Frank lifetime free rent:

> The subsequent sale from Stephen to Giovanna did not change the fact that Plaintiff would remain at the premises for the remainder of his life. Certainly the ability to live rent free for the remainder of Plaintiff's life carries value whether quantitative or not in the assessment of value...

This admits the constructive trust and Gia's responsibility as a successor trustee.

The transfer to Gia was unsupported by consideration. Upon transfer to her, the trust flowed through to Gia, even if she personally did not, at the beginning, participate in the violation of a fiduciary duty. **76 AmJur 2d, *Trusts, sec. 201* *n.8.*** *See also, Orlando v. Ottaviani,* **337 Mass. 157 (1958)** (trust carried with the property even if successor trustee had no knowledge of the trust, if consideration is inadequate). *Berry v. kyes, supra at 59, citing Jones, supra.* That Gia was at the meeting belies her claim that she had no knowledge of the trust that Stephen breached. Further, we must infer that she knew, at least, of a promise that Frank could ***42** live rent-free for life, because she trumpeted at trial the fact that she let this happen. *2TTr 126.* Her reaches into the equity for closing costs and the money to buy Stephen's business (as well as her giving him $200/ month from rents and control), violate her obligations as a trustee, viewing her as a co-conspirator or as a down-stream recipient.

The payment on this house is expensive now, especially when compared to Frank's prior payment. The frugality of his ownership has given way to the residua of Stephen's self-indulgence. Frank was, before the transfer to Stephen, basically secure, if not "rolling in dough". He had money in the sock drawer, and was glad to loan some of it to Stephen for the phone business, and later for the apartment (this before he found what happened to his equity). He had use and control of the property. Now, especially with the fall in home values since Stephen gave it to Gia, the equity in the house is small. But for this imbroglio, Frank's loan would have been paid in 2007. The amount last borrowed by Gia was fifteen times as large as Frank's balance. He is prohibited use of the garage or the apartment financed by his equity. [Note that Gia admitted the latter in an interrogatory answer, and then implausibly tried to say

***43** she meant to bar Frank's son-in-law/counsel, or Frank *and* counsel. **2TTr 108-114**].

A return of title to Frank will require that he address the matters of the feloniously-obtained last loan and remediation of the illegalities. His estate is now in tatters. Meanwhile, Stephen has cost him the bulk of his equity, and Gia claims the rest. Stephen's

debt to Frank from the judgment on the contract claim is uncollectible, one would expect, sitting behind the tax obligations that are on record. Equity demands that the people who got the money pay the loans, and that Frank get back his home.

The law in Massachusetts is clear that a person who takes from a trustee with notice, or without sufficient consideration, is liable either to reconvey the property or to compensate the owner for its value. **Orlando, Ratshesky and Berry, supra.** It is suggested that the home should be conveyed to Frank, irrespective of the fraudulently obtained loan to Gia, and further, upon that happening, he should be awarded (after hearing) an amount sufficient to legalize the project as part of the contract judgment (that will be partially satisfied by a reconveyance), or as equitable restitution damages from Gia.

***44 IV. The court (trial part one) erred in precluding Frank from impeaching Gia by means of the falsified documents related to her 2006 loan. He erred, also, in precluding impeachment of Stephen by use of Taunton Building Department records that revealed a course of self-serving deceit by Stephen.**

In the first trial half, Frank proposed to question Gia by use of documents from her 2006 refinance. Their contents are set out supra at 16-17. Frank's clear purpose was to show the corruption rampant in her stewardship of the house, part of a continuing fraud. ***Young, et al., Evidence, 19 M.P.S. sec. 404.4(1), p. 202;*** *Neipris v. Graphic Laboratories, Inc.,* **4 Mass.App.Ct. 767 (1976)**(bad motive shown). Evidence of motive is admissible, and that is part of what is shown by this evidence as to both defendants. Kurland v. Mass. Amusement Corp., 307 Mass. 131, 140 (1940). The evidence showed that to facilitate Stephen's self-indulgence, Gia would defraud a lender and Frank at the same time. As to the latter, she reneged on her agreement to obtain a lower, fixed interest rate, this revealing her consistent duplicity about the house. A jury would likely take this and conclude she would say anything, true or not.

The standard of review on this issue is the talismanic **abuse** of discretion standard. ***45 Campbell v. Ashler, 320 Mass. 475 (1946).** The substantive basis of the inquiry goes to the proposition that evidence of prior bad acts may generally be excluded for impeachment, by extrinsic evidence or cross-examination of a witness "about that witness' part in transactions *not relevant to the issues on trial." Young, supra 608.2, pp. 391-92.* It is suggested that Frank has shown an **abuse** of discretion.

In order to be admissible, evidence must be relevant. **Section 401, Mass.G.Evid** reads:

> 'Relevant evidence' is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without [it].

It is admissible unless it is barred by an exclusionary rule. *Poirier v. Plymouth,* **374 Mass. 206, 210 (1978).** There is no impediment here. Evidence of bad acts to prove the character of a person, i.e., to prove that -the bad actor is generally a bad person, and to show that he/she acted in conformity therewith, is usually inadmissible. On the other hand,

> [i]t may... be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, nature of relationship, or absence of mistake or accident.

Mass.G.Evid. sec. 404 at 46.

***46** Thus, evidence of the manner and means by which the defendants took from the equity for Stephen's purposes is distinctly "of consequence to the determination of [this] action." Next, because the intertwining of Stephen's motive to help himself and Gia's direct assistance with the diminution of Frank's equity provides direct evidence of breaches of the fiduciary duty owed to Frank, evidence of their misdeeds related to their use and misuse of the property would make Frank's case appear much more likely and theirs less so, than would be the case without admission of the evidence.

That portions of the evidence might implicate criminality (i.e., a Title V violation, **310 C.M.R. 15.000,** and mortgage fraud) is of no import in this discussion, no more so than would be evidence that they might have used a gun to rob Frank. If the fact of the robbery is admissible, so is the use of the gun. Here, they preyed upon unwitting other victims (the Building Department and the mortgage lender--although lender's counsel was aware of all the facts, so it was on notice that way) for their purposes. Motive, means, intent and the nature of their relationship are always in evidentiary play. *Kurland, ubi supra.*

***47** At the heart of the issue is a stream of conduct by which first Stephen and then he and Gia together took most of the equity in the house for Stephen's solipsism. Their doings were concealed until Frank found them out at the Registry of Deeds. By her refinance, Gia piled on the corruption. This evidence is substantive, not merely impeachment material, and its probative value far outweighs any prejudicial effect. *See Commonwealth v. Martin, 442 Mass. 1002 (2004)*(question of admission goes to undue prejudice), *citing Commonwealth v. Helfant, 398 Mass. 214, 224-25 (1986).* Again, the purpose of this conduct was to meet Stephen's selfish goals, a purpose that was inconsistent with his fiduciary duty (and that of Gia, also). These facts make out a strong case for disbelief of both, and the exclusion of the evidence constitutes an **abuse** of the discretion permitted a judge in ruling on admissibility. *Comm. v. Aviles, 461 Mass. 60, 71-73 (2011). See Young, et al., supra, at 102.2 (1998), preceding n.38:*

> [T]he discretion afforded the judge extends to the manner of taking testimony and does not permit alteration of the law of evidence itself.

The evidence reveals the animus underlying the corruption in the defendants' dealings with the house, and is relevant. It should have been admitted. It might al ***48** so debunk the theory that Gia is the beneficent child who volunteers her time for good causes. **1TTr 122.**

V. The trial court erred in dismissing the elder abuse count.

The complaint alleges a violation of ch. 19A, secs. 14-26, the **Elder Abuse** Act, and requests damages. The theory is that the statute provides a private right of action after a violation. On motion of the defendants, that count was dismissed on grounds that there is no private right. This was error.

Frank cited **Loffreddo v. Center for Addictive Behaviors, 426 Mass. 541, 543 (1988),** which held:

> It is a general rule of statutory construction that a violation of a duty created by statute, resulting in damage to one of the class for whose benefit the duty was established, confers a right of action upon the injured person...

Loffreddo relies on **Berdos v. Tremont & Suffolk Mills, 209 Mass. 489 (1911).** Later in **Loffredo, at 544-45,** the court stated,

> We are...a common law court, and our powers do include the power to supplement legislation in appropriate cases unless the Legislature explicitly prohibits us from doing so.

Frank was "**elderly**" (60 years or older, **ch.19A, sec.14**), and is in the class protected by the Act. The definition of "**elder abuse**", sec. 14, includes situations similar to Frank's:

> ***49** an act or omission by another person, which causes a substantial monetary or property loss to an **elderly** person, or causes a substantial monetary or property gain to the other person, which gain would otherwise benefit the **elderly** person but for the act or omission of such other person...

Here, the pilferage from the equity, by both defendants, caused a substantial gain to Stephen, and it would otherwise have benefitted Frank. Thus, the definition is met substantively.

In **section 18(b)** of the Act is a requirement that a party covered by the Act may be referred for legal assistance. This obviously gives one a right to seek recompense for monetary or property loss, exactly what is involved here. Private enforcement will avoid public expense, protecting the **elder** and the municipal fisc. The General Court did not prohibit the right, ergo est.

CONCLUSION

It is respectfully suggested that the judgment must be reversed as to both defendants on the constructive trust and fraudulent transfer issues, and the court should order, first, a conveyance from Gia to Frank, based on a declaration that the transfer to her was fraudulent, without attention to the current mortgage, save for the matter of equitable subrogation, *see East Boston Savings Bank v. Ogan,* **428 Mass. 327 (1998).** A ***50** declaration should enter that Stephen held as a constructive trustee, and the trust followed the property to Gia. Then, in equity, it should be ordered that she, in consideration of violations of their fiduciary duty, must convey the house to Frank, with a possible adjustment of the judgment on the contract count after hearing to address costs of remediation of the illegalities. This should otherwise leave intact the judgment against Stephen on the contract count, as to which his appeal has been dismissed.

In the alternative, it is suggested the judgment should be reversed as it goes to the constructive trust and fraudulent transfer issues, leaving intact the judgment on the contract count, and a new trial should be granted on those two issues with a speedy trial order. There should also be allowed a trial on the **elder abuse** count. Frank further requests any other relief the Court deems just.

End of Document